

ORIGINAL



0000131716

THE
ADAMS
LAW FIRM, PLLC

RECEIVED

JEFFREY R. ADAMS, ESQ.

125 GROVE AVE. P.O. BOX 2522 PRESCOTT, AZ 86302 928-445-0003 FAX: 928-443-9230 law_office@jradamslaw.com

November 11, 2011

2011 NOV 15 A 9:21

AZ CORP COMMISSION
DOCKET CONTROL

File No. 509.01

TRANSMITTED VIA FIRST CLASS MAIL

Docket Control
Arizona Corporations Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Arizona Corporation Commission

DOCKETED

NOV 15 2011

Re: In re the Matter of Mark W. Bosworth, et al.
Docket No. S-20600A-08-0340

DOCKETED BY	
-------------	--

Dear Sir and/or Madam:

Enclosed herewith are the original and 14 copies of our Reply to Response to Motion to Dismiss, etc. in the above-referenced matter. Please file the same and conform and return one copy to us in the stamped envelope provided.

Sincerely,

THE ADAMS LAW FIRM, PLLC

By

Al Cedro

Paralegal to Jeffrey R. Adams, Esq.

AMC/hs
Enclosure(s)

Jeffrey R. Adams, #018959
THE ADAMS LAW FIRM, PLLC
125 Grove Ave
Post Office Box 2522
Prescott, AZ 86302
(928) 445-0003
Fax: (928) 443-9230
law_office@jradamslaw.com
Attorneys for Respondents Bosworth

RECEIVED

2011 NOV 15 A 9:21

AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

In the Matter of:

MARK W. BOSWORTH and LISA A.
BOSWORTH, husband and wife;

STEVEN G. VAN CAMPEN and DIANE
V. VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L.
SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE
BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES,
LLC, and Arizona limited liability
company;

3 GRINGOS MEXICAN INVESTMENTS,
LLC, an Arizona limited liability company;

Respondents.

Docket No. S-20600-A-08-0340

**REPLY TO RESPONSES TO
MOTION TO DISMISS OR IN THE
ALTERNATIVE TO STRIKE
EVIDENCE**

AND

**MOTION FOR SANCTIONS FOR
PROSECUTORIAL MISCONDUCT**

(Oral Argument Requested)

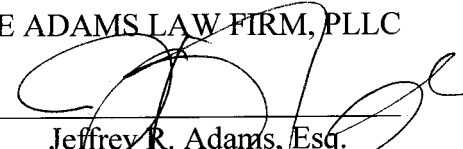
(Assigned to the Hon. Mark E. Stern)

Pursuant to Rule 14-3-104, Corporation Commission Rules of Practice and Procedure, and the United States and Arizona Constitutions, Respondents Mark and Lisa Bosworth, husband and wife (collectively herein, "**Bosworths**" or "**Respondents**"), through their undersigned counsel, hereby file their Reply to the Motion to Dismiss or in the Alternative to Strike Evidence and Motion for

1 Sanctions for Prosecutorial Misconduct. This Reply is supported by the record of the proceedings
2 and the accompanying Memorandum of Points and Authorities.

3 Respectfully submitted this 11 day of November, 2011.

4 THE ADAMS LAW FIRM, PLLC

5 By 
6 Jeffrey R. Adams, Esq.
7 Attorney for Respondents Bosworth

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 The Bosworths will attempt to keep their Reply simple. The consideration of their Motion to
10 Dismiss also should be relatively simple. Candidly, it is difficult to understand how the State cannot
11 see the prejudice that has occurred to the Bosworths in this case because we set forth the detail
12 supporting that prejudice in rather explicit detail in the Motion to Dismiss. The fact is that the State
13 has engaged in some rather shameful conduct in this case most of which predated the current
14 prosecutor's involvement herein. Contrary to the position taken by the State now, it is an absolute
15 fact that the State did not withdraw the Bosworth Consent or notify him of its intent to do so until
16 after he testified and had surrendered his constitutional and procedural rights. For the State to say
17 otherwise is, quite simply, a lie and one that the Bosworths have the ability to prove.
18

19
20 Importantly, the State did not dispute the accuracy or truthfulness of the facts set forth in the
21 Motion to Dismiss. Rather, those facts are uncontroverted and therefore deemed admitted. Those
22 facts include (i) that between July 3, 2008, and June 2, 2010, the State had nearly two years to
23 conduct discovery and address the concerns of the State's witnesses for purposes of negotiating the
24 terms and conditions of the Bosworth Consent to ensure that it was factually accurate and to prepare
25 its witnesses for their testimony at the hearing in this matter; (ii) the Bosworth Consent was agreed
26 upon and signed before the hearing in this matter started; (iii) that the State, through Mr. Ludwig,
27 exempted the Bosworths from the hearing when it started on June 7, 2010; (iv) that after Respondent
28

1 Respondent Mark Bosworth testified as a State's witness, the State revoked and withdrew the
2 Bosworth Consent without submitting it to the Commission for a vote and approval; and (v) after
3 revoking and withdrawing the Bosworth Consent, on August 23, 2010, and apparently realizing that
4 its case was imperiled as against the Bosworths, the State filed a Motion to Set Hearing in which the
5 State requested that a new hearing be set for purposes of pursuing the claims against the Bosworths.
6

7 As a result of the foregoing, this tribunal itself acknowledged that the State to have caused (i)
8 a "real morass administratively" and (ii) "a real problem from a question of due process...." See
9 August 26, 2010, hearing transcript (Exhibit "5") at 851:6-13 and 853:10-13. In fact, this tribunal
10 has acknowledged that it didn't "know where [the Bosworths were] at in relationship to the Fifth
11 Amendment...." *Id.* at 853:16-17 (emphasis added).
12

13 While we acknowledge that it would be difficult if not impossible to compel Mr. Ludwig and
14 others in the offices for counsel for the State including Julie Coleman to testify concerning the events
15 surrounding and timing of the withdrawal of the Bosworth Consent, we would nonetheless like to
16 do so and, frankly, believe that an evidentiary hearing on the issue with Mr. Ludwig and Ms.
17 Coleman placed under oath and testifying would be appropriate. However, even if they do not do
18 so in this case, rest assured that at some point in time they will be required to do so if not in this
19 tribunal but elsewhere. Make no mistake, the Bosworth Consent was not withdrawn until after the
20 State got what it wanted out of the Bosworths – namely Mr. Bosworth's candid and direct testimony
21 in the State's case in chief uncluttered by his assertion of various constitutional privileges under the
22 mistaken belief that the hearing was not to be used to pursue him as a target of the Commission.
23 And while in its Response the State goes to great lengths to describe the circumstances surrounding
24 the negotiation of the Bosworth Consent, what is noticeably absent from the State's Response is any
25 actual evidence to support their baseless and untruthful assertion that they notified the Bosworths
26 that their consent was going to be withdrawn prior to Mr. Bosworth testifying. What is interesting
27
28

1 in this regard is that in making those allegations, the State does so under the penalty of perjury and
2 subject to Rule 11, Ariz. R. Civ. P., and Rule 42, ERs3.1, 3.3, 3.4, 3.8, 4.1, 4.3 and 4.4 and all of
3 which will be pursued, if not in this case, on another date and at another time. Nonetheless, given
4 the critical importance of protecting an accused's constitutional rights, the mandates set forth in the
5 foregoing Rules must be followed by the State regardless of its personal beliefs about the Bosworths
6 and the State has an affirmative obligation to ensure that the Bosworths' constitutional rights are
7 protected and not infringed as does this tribunal.

9 We will not restate herein the prejudice that has been foisted upon the Bosworths as a result
10 of the violation of the Bosworths' due process rights that this tribunal already has recognized,
11 stating:

13 Well, you know, the problem that I see is these things are still going to
14 be in a recod of this proceeding here. So that to me is and it isn't going
to go away. It's been transcribed. It's part of the record.

15 See hearing transcript for August 26, 2010, attached hereto as Exhibit "1" at 857:3-7. Rather, we
16 will simply incorporate herein the recitation of the same set forth in the Motion to Dismiss.

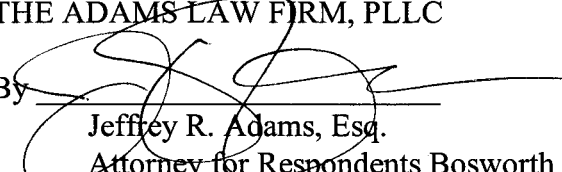
17 However, this tribunal should not condone the type of seedy, underhanded tactics employed
18 by Mr. Ludwig, Ms. Coleman and others simply to guarantee that Mr. Bosworth would testify in the
19 hearing in this matter under the guise that the Bosworth Consent was a done deal only to pull that
20 rug out from underneath him and his wife after the State achieved its goal and objective of having
21 him testify. The fact is, again, that the State waited until after it had finished its case in chief to pull
22 that rug out. And because of that, the Bosworths are entitled to dismissal or the suppression of all
23 of the evidence presented thus far in this case as it pertains to the Bosworths. The State also should
24 be stuck with having already finished its case in chief. As the transcripts in this case reveal, the State
25 had wrapped up its case in chief following the testimony of Mr. Sargent. In this regard, this tribunal
26 will recall that on June 25, 2010, and again on August 26, 2010, the State advised that at that time

1 it had a single witness to call in its case with that witness being Mr. Sargent. *See* hearing transcript
2 for June 25, 2010, at 844:4-7 and August 26, 2010, at 864:13-20 attached hereto as Exhibit "2" .
3 And as the transcript in this matter shows, the State completed its examination of Mr. Sargent on
4 August 26, 2010. Therefore, at best, the State should be limited in this proceeding to conducting
5 cross-examination of Mr. Sargent's and the Bosworths' witnesses moving forward in the event the
6 Motion to Dismiss is not granted. The State most certainly should not be allowed to re-open its
7 entire case in chief as a reward for violating the Bosworths' constitutional rights.
8

9 Based on the foregoing, this matter as it pertains to Respondents Bosworth should be
10 dismissed with prejudice. As stated in the Motion to Dismiss, in the event this tribunal denies the
11 request for dismissal, the only appropriate remedy to rectify the damage done and to ensure some
12 level of fairness would be to strike and exclude from consideration by this tribunal as against the
13 Bosworths any of the testimony and evidence offered and admitted up to this point in time. Finally,
14 given the prosecutorial misconduct that has occurred, sanctions deemed appropriate by this tribunal
15 are requested.
16

17 Respectfully submitted this 11 day of November, 2011.
18

19 THE ADAMS LAW FIRM, PLLC

20 By 
21 Jeffrey R. Adams, Esq.
22 Attorney for Respondents Bosworth

23 Original of the foregoing sent via
24 First Class Mail and electronic
25 mail this 11 day of November, 2011 to:

26 Docket Control
27 Arizona Corporation Commission
28 1200 West Washington
Phoenix, Arizona 85007

1 Copy of the foregoing sent via
2 First Class Mail and electronic
mail this 11 day of November, 2011 to:

3 Mark E. Stern
4 Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 1200 West Washington
8 Phoenix, Arizona 85007

9 Wendy L. Coy, Esq.
10 Arizona Corporation Commission
11 Securities Division
12 1300 West Washington
13 3rd Floor
14 Phoenix, Arizona 85007-2929
15 Attorneys for the State

16 Paul J. Roska, Esq.
17 Jeffrey D. Gardner, Esq.
18 Timothy J. Sabo, Esq.
19 Roshka DeWulf & Patten, PLC
20 400 E. Van Buren Street, Suite 800
21 Phoenix, Arizona 85004
22 Attorneys for Respondents Sargent

23 Matthew Neubert, Director
24 Securities Division
25 Arizona Corporation Commission
26 1300 W. Washington Street
27 Phoenix, Arizona 85007

28 Robert D. Marshall, Esq.
Joshua R. Forest, Esq.
Julie M. Beauregard, Esq.
Mitchell & Forest, P.C.
1850 North Central Avenue, Suite 1715
Phoenix, Arizona 85004
Attorneys for Respondents Van Campen

By 

EXHIBIT "1"

1 be an appearance that his due process rights have been
2 somehow diminished or undermined.

3 ALJ STERN: Well, you know, the problem that I
4 see is these things are still going to be in a record of
5 this proceeding here. So that to me is and it isn't
6 going to go away. It's been transcribed. It's part of
7 the record.

8 The other thing is, and I know there are
9 separate trials sometimes in court, but it just creates
10 a number of issues.

11 MS. COLEMAN: I understand that, but, you
12 know --

13 ALJ STERN: Are you going to use all different
14 witnesses then, if this, assuming this matter goes
15 forward against Mr. Bosworth and it isn't resolved in
16 some manner, are you going to use different witnesses?

17 MS. COLEMAN: Probably not, Your Honor. We have
18 principals that were involved in these transactions,
19 including Mr. Sargent and Mr. Van Campen, and they would
20 be witnesses.

21 I mean, this issue -- we understand it's
22 problematic, however, the same issue arises if this case
23 went to recommended order and a rehearing was granted.
24 So we understand there's issues, but it's a situation
25 that could have arisen even if we would have brought

EXHIBIT "2"

if he retains counsel

, the motion for

we have jurisdiction

think in the Division's

e it's a section of the

rney General is the one

ctive orders. I have

o clarify, we haven't

simply asked --

rative immunity?

at the Division not go

eve, I don't believe

special petition,

sider. I don't believe

munity, as such. I

witness and she's

you'll see where you

strike her affidavit by

hat with respect to the

out there on the

1 record. It's on the Internet. It's not going to be

2 stricken. It's the same as any other matter where you

3 can't cross-examine a witness, it's a piece of paper at

4 this point, for whatever it's worth. Whether in fact

5 what's stated in the affidavit is in fact correct, it's

6 very hard to say at this point.

7 So, as I said, I'll take the matter under

8 advisement on this motion for a separate hearing for

9 Mr. Bosworth.

10 Motion for protective order denied.

11 Motion to strike the affidavit attached to the

12 motion for protective order is denied.

13 And I think at this point we're sort of ready to

14 proceed.

15 Any other witnesses you're going to call?

16 MR. LUDWIG: Yes, Your Honor, the Division has

17 one final witness and that is Michael Sargent.

18 ALJ STERN: That's your only other -- he's the

19 end of your case?

20 MR. LUDWIG: Correct.

21 ALJ STERN: Okay. Mr. Sabo, assuming we still

22 have some testimony today from your client, I assume

23 that's him behind you.

24 MR. SABO: Yes, Your Honor.

25 ALJ STERN: Are you planning to call any